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No. 98-1628

In The

# Supreme Court of the United States

SALT RIVER AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

*Petitioner,*

vs.

HAROLD DAWAVENDEWA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE NAVAJO NATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Navajo Nation adopts the "Questions Presented" section of the Petition for Writ of *Certiorari*.

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

**COMES NOW** the Navajo Nation by counsel, pursuant to Sup.Ct.R. 37(b), and moves this court for an order granting leave to file a brief *amicus curiae* in support of the Petition for Writ of *Certiorari;*

Petitioner has consented. Respondent has declined, although it (a) previously consented to the filing of an *amicus curiae* brief by the Navajo Nation in support of The Petition for Rehearing and Suggestion for Rehearing *en banc* filed below in the United States Court of Appeals for the Ninth Circuit and (b) has stated it will consent to the Navajo Nation filing a brief *amicus curiae* if this Court grants *certiorari.*

The interest of the Navajo Nation is as follows:

1. In 1985, the Navajo Nation Council passed the Navajo Preference in Employment Act, codified at 15 NNC § 601, *et seq.* (1995), as amended, by which terms enrolled members of the Navajo Tribe are afforded preferential treatment in hiring.

2. It is the belief of the Navajo Nation that this type of preference is legislatively endorsed and required by numerous other tribal governments.

3. Unemployment on the Navajo Nation is currently approximately fifty-eight percent (58%).

4. The opinion below in the Ninth Circuit is tantamount to vetoing the Navajo Preference in Employment Act.

5. No rights of any party will be violated by the acceptance by this court of a brief *amicus curiae* by the Navajo Nation. Conversely, the right to be heard of the two hundred forty thousand (240,000) members of the Navajo Nation, citizens of the United States of America, will be denied if this Motion for Leave is not granted.

Respectfully submitted,

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## OPINIONS BELOW

The Navajo Nation adopts the "Opinions Below" section of the Petition for Writ of *Certiorari*.

## JURISDICTION

The Navajo Nation adopts the "Jurisdiction" section of the Petition for Writ of *Certiorari*.

## STATUTORY PROVISION INVOLVED

The Navajo Nation adopts the "Statutory Provision Involved" section of the Petition for Writ of *Certiorari*.

## INTEREST OF *AMICUS CURIAE*

Unemployment on the Navajo Nation rages above 55%.[1] This is more than ten times the national average and means that one out of every two Navajos cannot find work, thereby becoming a financial burden on the Navajo Nation and the larger society as well.

Economic development is slow in coming to Indian Country, and the Navajo reservation is no exception (especially given its repeated rejections of the gambling industry). Jobs, any jobs, on or near the Navajo reservation must be first afforded the Navajo people, on whose homeland the employer operates. As will be developed

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[1] U.S. Department of the Interior, Bureau of Indian Affairs, *Labor Market Information on the Indian Labor Force*, 1997.

below, Congress understood and responded decisively to this when it adopted Title VII and, especially, the "Indian preference exemption" contained in 42 U.S.C. § 2000e-2(i) (1997).

This Court has already essentially upheld the position of *amicus* a quarter century ago in *Morton v. Mancari*, 417 U.S. 535 (1974). Unfortunately, the Ninth Circuit has misinterpreted both Congressional intent and this Court's ruling. If allowed to stand, it will shatter an already fragile economy wherein, for far too many, life, liberty, and the pursuit of happiness is a cruel hoax.[2]

## ARGUMENT

### I. THE NAVAJO NATION HAS A SOVEREIGN'S DUTY TO ADDRESS THE VICIOUS UNEMPLOYMENT ON ITS RESERVATION, IN COORDINATION WITH UNITED STATES LAWS WHICH, IF AT ALL AMBIGUOUS, MUST BE INTERPRETED CONSISTENT WITH THE LONGSTANDING FEDERAL POLICY OF STRENGTHENING TRIBAL GOVERNMENT.

*No other group of Americans is more economically depressed than Native Americans, and no other areas in America suffer more from . . . a lack of job*

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[2] Petitioner has consented to the filing of this *Amicus* Brief. Respondent has declined, as noted in the attendant Motion for Leave to File. Pursuant to Rule 37.6 of the rules of this Court, *amicus* states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than *amicus*, has made a monetary contribution to the preparation or submission of this brief.

*opportunities than do Indian reservations and Alaska Native villages. . . . In my lifetime I have been to many places around the world and have experienced many terrible living conditions. What is so shocking is that the social and economic conditions for many Navajos closely resemble those of people living in Third World countries. . . .*

- *Your poverty rate is five times the national average;*
- *Two-thirds of your houses are substandard because they lack running water, indoor plumbing, or electricity; and*
- *Three-fourths of your people can't get home telephone service, and so are cut off from critical emergency help and information.*[3]

A. With certain notable aberrations, longstanding federal policy has been to strengthen tribal governments.[4] The policy, to be sure, has been to help Indians, but since 1934 it has been uniquely and forcefully implemented via *tribal membership*, not individually. This may be due to the

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[3] Senator John McCain (R-AZ), January 18, 1996 Statement before the Navajo Nation Council.

[4] "The cases reflect a pervasive influence of (a) the tradition of federal policy to encourage the development and exercise of tribal self-governing powers and (b) the assumed federal obligation to preserve and protect those powers. These factors have been the touchstones of statutory interpretation for the courts." FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (2d ed. 1982), at pp. 242-3, citing as authority *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *United States v. Wheeler*, 435 U.S. 313 (1978); *Bryan v. Itasca County*, 426 U.S. 373 (1976).

circumstances in which Europeans typically first encountered Native Americans, i.e., clustered and rigidly segregated in discrete tribal communities with historically accepted general territories. In the Navajo situation, the federal government reduced but generally recognized this tribal boundary as a basis for the reservation. Tribal communities have continued to govern themselves through their own individual tribal governments. When Europeans, or their political descendants in Congress today (or in 1964), spoke of "Indians" they meant, and knew they meant, "tribes." And this has the highest pedigree in American jurisprudence: in the United States Constitution, Congress is given the power to "regulate Commerce . . . with the Indian *Tribes*" (not with individual Indians). Article I, § 8 cl. 3 (emphasis supplied).[5]

B. Inherent in all of this, of course, is sovereignty. The Navajo Nation is a sovereign recognized by the federal and state governments and the numerous corporations and businesses, like Petitioner, which enter into commercial dealings with the Nation. The Navajo Nation has a government's usual duties and obligations. Some of these, like defense of borders, are provided by the federal government. But, like any other government, the Navajo Nation has an obligation to its citizens to protect and nurture their health and welfare. One primary way to do

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[5] Nowhere is this concept clearer than in the history of the over 400 treaties between first Europeans, then the United States, and Native Americans. Each separate treaty was made with *this* specific tribe with language specific to *this* tribe's historical land, and (thankfully, at least, for the Navajos) regarding *this* land becoming *this* tribe's reservation.

this is through the development of employment opportunities, as encouraged and protected by (a) the lease language at issue (*see* Petitioner's Brief at 2) and (b) the Navajo Preference in Employment Act (15 NNC § 601 *et seq.* (1995)) (*see* Petitioner's Brief at 3, 9). Absent review by this Court, the Ninth Circuit negates the ability to fulfill this obligation, and destroys the fabric of employment law utilized and acknowledged by employers like Petitioner on the Navajo reservation since 1969.

And, most importantly, this toppling by the Ninth Circuit of Navajo private employment law (a) is not based on sound legal reasoning and (b) as will be discussed in the following section, violates both Congressional intent[6] and this Court's jurisprudence.

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[6] "Before holding that treaties or statutes limit tribal powers, however, the courts have insisted upon a clear and specific expression of congressional intent to extinguish traditional prerogatives of sovereignty. Judicially accepted canons of construction dictate that legislation be liberally construed and that any ambiguities be resolved in favor of Indians. Furthermore, even when a statute was passed in an assimilationist era, which might suggest a generalized congressional intent to abrogate *tribal* powers, the courts will not 'strain to implement a policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship.' " COHEN, *supra* note 3, at 242 (footnotes omitted) (emphasis supplied).

## II. CONGRESS CLEARLY AND INTENTIONALLY EXCLUDED THIS ISSUE FROM ALL TITLE VII ANALYSIS BY EXPLICIT STATUTORY LANGUAGE AS CORROBORATED BY SUBSEQUENT AND RELEVANT LEGISLATION IN OTHER AREAS OF INDIAN LAW.

Title VII prohibits discrimination against *any* protected category (race, color, religion, sex, or national origin). But explicitly excepted from that worthy prohibition, at 42 U.S.C. § 2000e-2(i), is the clear Indian preference language for employers on or near an Indian reservation. They are permitted to favor, pursuant to a publicly announced practice of preference, Indians living on or near a reservation (rationally, that same reservation where the employer operates). This subsection (i) exception is clear, concise, and blunt: "*Nothing* contained . . . (herein) . . . shall apply to any business . . . on or near an Indian reservation . . . " (emphasis supplied) regarding the employment of Indians on or near (rationally, that) reservation.[7]

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[7] If, as Respondent claims, Congress intended to simply help Indians generally, "on or near the reservation" is irrelevant and there could have simply been a blanket "Indian preference" everywhere. But the use of "on or near the reservation" clearly implies *these* Indians (members of *this* tribe) on *their* reservation. To interpret otherwise would encourage "job migration" with Indians leaving their homelands and chasing jobs wherever they may be found at the moment "near" some other tribe's reservation. Such a situation would further weaken tribal unity and tribal governments in direct opposition to federal policy.

The controlling case on this issue is *Morton*, in which this Court approved the Bureau of Indian Affairs' preference for Indian job applicants and candidates for promotion.

*Morton* made three things explicitly clear. First, what appears to be racial (i.e., Indian) preference is really political affiliation preference. Second, that preference is permissible. Finally, when subsection (i) says "nothing", it means "nothing."[8]

Logically, Title VII does not apply to this Indian preference whether the claim is "race" or a neatly retooled (but equally flawed) "national origin" argument.[9]

## III. THE NINTH CIRCUIT MISINTERPRETED BOTH THE VIABILITY OF THE EEOC REGULATION AND THIS COURT'S HOLDING IN *MORTON*.

The Ninth Circuit's decision should be overturned on several grounds: (a) it ignored the abstention and contractual "benefit of the bargain" issues; (b) it relied on a

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[8] The overriding import of this was recognized by the Court: "If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 USC) [25 USCS] would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Morton* at 552. (authorities omitted).

[9] Presumably "color" as a category would also be excluded under this "nothing means nothing" analysis. And, since there is no hierarchy of protection among the Title VII classes, the *Morton* endorsement would apply equally as the circumstances dictate.

now suspect EEOC policy statement; and (c) it incorrectly applied this Court's holding in *Morton*.

The Ninth Circuit erred when it did not require abstention at the District Court level. Likewise, the court misread the contractual "benefit of the bargain" lease issue, whereby the Navajo Nation originally granted lessee/Petitioner Salt River Project ("SRP") the right to construct and operate its generating station for the explicit consideration of job creation and Navajo preference. In fact, these jobs were so crucial to the economic lifeblood of the Nation that SRP was able to exact additional consideration in the form of Navajo tax waivers. (This required approval by the 74-member Navajo Nation Council, the governing body of the Nation, by resolution of May 27, 1969.)

Error was also committed when the Ninth Circuit relied on an EEOC policy statement[10] which, while well-intentioned, failed to properly interpret and apply this Court's decision in *Morton*.[11] Even more compellingly, the

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[10] *Policy Statement on Indian Preference Under Title VII*, Fair Empl. Prac. (BNA) 405:6647 (May 16, 1988).

[11] It is literally hornbook law that a statute trumps its regulatory interpretation: "Administrative regulations must be consistent with the . . . statutory authority by which they are authorized. Administrative rules may not enlarge, alter, or restrict the provision of the statute being administered." 2 Am. Jur. 2d *Administrative Law* § 227 (1994). This Court has confirmed the point in *United States v. Larionoff*, 431 U.S. 864 (1977), finding that regulations must be consistent with their authorizing statute and must effectuate the will of Congress; a regulation which creates a rule "out of harmony with the statute is a nullity." *Id.* at 873, footnote 12, quoting with approval *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129 (1936).

EEOC based its analysis on other federal regulatory interpretations which were themselves essentially unequivocally rejected and negated by Congress. The EEOC had based its policy on regulations interpreting provisions of the Indian Self-Determination and Education Assistance Act (ISDA), Section 7 of Public Law 93-638. But the EEOC then failed to change its policy when Congress in 1994 amended that section of the law by adding new subsection (c) endorsing the use of tribal preference laws and policies. *See* Public Law 103-413 Section 102, codified at 25 U.S.C. § 450e(c) (1997).[12]

Congress' 1994 amendment to ISDA's employment preference provision did two things relevant to these proceedings: first, it clarified beyond argument congressional approval of tribal preference. Second, in so doing, it collapsed the explicit and avowed foundation of the EEOC policy statement on which the Ninth Circuit later based its decision. (The argument does not follow, however, that since Congress *did* amend ISDA but did *not* amend Title VII, it favored conflicting policies. Congress

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[12] The Navajo Nation expressly sought the amendment of Section 7 of the ISDA. This was done to avoid further disputes between Navajo law (the Navajo Preference in Employment Act, 15 NNC § 601 *et seq.*, and the Navajo Nation Business Preference Law, 5 NNC § 201 *et seq.*) and federal law when implementing the ISDA. *See* Testimony of Navajo Nation Representative Britt E. Clapham, II, Senior Assistant Attorney General, as referenced at S. REP. NO. 103-374 (1994) at 7. Throughout the development of Public Law 103-413, the Nation consistently advocated this change in the ISDA before both the Senate and the House of Representatives, as well as with Administration representatives.

had no need to clarify Title VII; this Court had already precisely done so in 1974, in *Morton*.)

Finally, the Ninth Circuit misinterpreted and misunderstood *Morton*, which stands for the proposition that "Indian preference" is actually "tribal preference" and that such preference withstands both Fifth Amendment and Title VII scrutiny.

Significantly, *Morton* is consistent with both the Framers' intent as expressed in the United States Constitution, as discussed above, and congressional intent as found in numerous federal statutes. Throughout the U.S. Code, "Indian" is routinely defined as "a member of an Indian tribe"; a political distinction, not a racial one. Mere *eligibility* for membership in a tribe by virtue of parentage is frequently insufficient: a person must actually be a recognized member.[13]

For example, in 20 U.S.C. § 4402(4) (1997), we find "[t]he term 'Indian' means any person who is a member of an Indian tribe"; at 20 U.S.C. § 7881(4) (1997), "[t]he term 'Indian' means an individual who is – (A) a member of an Indian tribe or band, as membership is defined by the tribe or band . . . ". Again, 25 U.S.C. § 1452(b) (1997) states " 'Indian' means any person who is a member of any Indian tribe, band, group, pueblo, or community which is recognized by the Federal Government as eligible for services from the Bureau of Indian Affairs . . . ".

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[13] While it is true that the Indian Child Welfare Act (25 U.S.C. §§ 1901-63 (1997)) [ICWA] references "enrolled or eligible to be enrolled", it has a different purpose, and implicitly acknowledges that tribal enrollment may not be automatic. Moreover, it has an explicit hierarchical preference for intra-tribal adoptions.

Congressional intent could not be clearer: "Indian" means "tribal member."[14]

This definition is recognized by the Department of Health and Human Services (DHHS)' regulations regarding eligibility for Indian Health Services which reflect the importance of actual membership rather than mere eligibility.[15] The initial draft of these regulations based eligibility on a blood quantum requirement rather than

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[14] There are still other federal statutes that define "Indian" as a member of a tribe. *See*, e.g., 25 U.S.C. § 3103(9) (1997); 25 U.S.C. § 3703(8) (1997); 25 U.S.C. § 4103(9) (1997); 42 U.S.C. § 1437a(9) (1997); 42 U.S.C. § 1996a(c)(1) (1997). Consistent with those statutory definitions, the Bureau of Indian Affairs, in determining eligibility for social services, defines "Indian" as "any person who is a member, or a one-fourth degree or more blood quantum descendant of a member of any Indian tribe." 25 C.F.R. § 20.1(n) (1996). So, in Title VII when Congress says "Indian" it knows what it means: a tribal member. Clearly, this modern standard congressional definition of the term "Indian" is based on tribal membership and is controlled not by race but by political affiliation, as correctly identified by this Court in *Morton*.

[15] The regulations specifically limit that eligibility to "persons of Indian or Alaska native descent who: (1) are members of a federally recognized Indian tribe. . . . " 42 C.F.R. § 36.12 (1996). The regulations also require verification of tribal membership: "(1) Documentation that the applicant meets the requirements of tribal membership as prescribed by the charter, articles of incorporation, or other legal instruments or traditional processes of the tribe and has been officially designated a tribal member by an authorized tribal official or body; or (2) Certification of tribal enrollment or membership by the Secretary of the Interior acting through the Bureau of Indian Affairs." 42 C.F.R. § 36.16(b) (1996). Indian blood alone is not sufficient for IHS eligibility; the person must be an enrolled member of a tribe.

tribal membership. However, commentors, including members of Congress, consistently opposed the blood quantum basis. "Many commentors expressed concern that inclusion of a specific blood quantum requirement would interfere with a tribe's sovereignty by eliminating some tribal members from eligibility based upon racial identity rather than on the political relationship which exists between tribes and the Federal Government." 52 Fed. Reg. 35044 (1987).

Based on these and other objections, DHHS amended the regulations to their present form, noting that IHS provides services "to Indian people because of the political relationship which exists between tribes and the Federal Government rather than on a racial basis." *Id.* "The Federal governments' [sic] underlying policy is to serve Indians, not as individuals, but as members of Federally-recognized governmental entities. . . . Moreover, the approach taken in this rule is consistent with the fact that Congress has recently defined the term 'Indian' in three related statutes essentially to mean a person who is a member of Federally recognized tribe. . . . *The definition of 'Indian' in the Indian Self-Determination Act reflects the special relationship between tribes and the Federal government.* Basing eligibility on tribal membership will strengthen the role and position of tribes as well as provide IHS with a consistent definition of 'Indian.' In our view, *reliance on tribal membership* will have positive implications for Indian self-determination, the role and authority of tribal government, inter-tribal relationships, and the existing Federal-Indian relationship." *Id.* at 35046 (emphasis supplied).

In *Morton*, this Court affirmed the federal policy of supporting *tribal* organizations and *tribal* development, as

the rational and effective way to protect individual Indians. "The overriding purpose of (the Indian Reorganization Act) was to establish machinery whereby Indian *tribes* would be able to assume a greater degree of *self-government*, both politically and economically." *Morton* at 542 (footnote omitted) (emphasis supplied). "The solution ultimately adopted was to strengthen *tribal government . . .* ". *Id.* at 543 (emphasis supplied). Finally, this Court noted that the Title VII Indian preference exemption "reveals a clear congressional recognition within the framework of Title VII, of the unique legal status of *tribal and reservation-based* activities." *Id.* at 545-46 (emphasis supplied).

In this present context, first in the Constitution and then routinely thereafter, the United States government has dealt with Native American issues on a tribal (not racial or individual) basis.

## CONCLUSION

This is a matter of survival for the economic life of the Navajo Nation. The established rules of Indian Law construction, the intent of Congress, and the wisdom of this Court all combine to support the Petition for Writ of *Certiorari*, and ultimate reversal of the Ninth Circuit's mistaken holding.

Respectfully submitted,

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